UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

TERRY S. LEDURE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:02 CV 84 RWS DDN
	)	
JO ANNE B. BARNHART, Commissioner of Social Security,	)	
	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This action is before the court for judicial review of the final decision of the defendant Commissioner of Social Security denying plaintiff Terry S. Ledure's applications for disability insurance benefits under Title II of the Social Security Act (the Act), 42 U.S.C. §§ 401, et seq. The action was referred to the undersigned United States Magistrate Judge for a recommended disposition under 28 U.S.C. § 636(b). The undersigned recommends remand.

I. BACKGROUND

A. Administrative record

On September 25, 2000, plaintiff, who was born on September 19, 1953, filed his applications for disability insurance benefits. He alleged that he became disabled on November 19, 1999. In a questionaire, he described his symptoms as pain in his lower back, left arm, shoulder, and neck. The sole job he listed in a work history report was construction, from May 1970 to December 1999. (Tr. 82, 86, 110.)

According to Dr. Michael E. Critchlow, who evaluated plaintiff on November 14, 2000, plaintiff could tolerate sitting for about

thirty minutes, standing for about ten minutes, and walking for about one hour. (Tr. 154, 158.) Dr. Critchlow indicated, as relevant, that plaintiff had less than full ranges of motion with respect to his cervical spine and lumbar spine. (Tr. 157.)

On April 9, 2001, the Administrative Law Judge (ALJ) conducted a hearing at which plaintiff, who appeared pro se, testified to the following. He was 5'11" tall, weighed 222 pounds, and had completed the twelfth grade. His normal weight was 180 pounds, but he had gained weight within the last six months. He had had hernia surgery, two back surgeries, and neck surgery. He stopped working outside the home in November 1999 because of his neck and back surgeries. Approximately three months later, he tried to go back to work, constructing cabinets from his home. He had not received back treatment since May 2000 and earned about $1,700 that year. He "put in full time," but did not get full-time work done; he could accomplish only 5 to 8 hours of work per week because of back pain and muscle spasms.(Tr. 32-38.)

Moreover, he could stand for only a short period of time, probably less than ten minutes. He could sit for only about ten minutes without having to get up and walk. Walking did not bother him; he could walk for an hour. He had not tried to lift over fifteen pounds; he could carry five pounds from one end of the room to the other, but carrying a twelve-pound item caused him lower-back discomfort. (Tr. 42-43.)

As to regular activities, plaintiff mowed the grass using a self-propelled mower and taking breaks to relieve back tightness, cared for his dog, walked to the mailbox to get the paper, worked in his shop, went fishing four times a week for up to one hour, occasionally watched television, went deer hunting during deer season, played cards once every two weeks, went to church once a week, mowed his grass, helped his wife with grocery shopping, swept

his shop with a broom, and went out to eat approximately four times a week. (Tr. 44-52).

At the hearing, plaintiff's wife also testified. She stated that plaintiff's medication relieved his muscle spasms but would cause drowsiness such that he could not use his power tools. She added that plaintiff needed help with shop activities such as lifting and carrying, as well as with hygiene activities such as drying his hair and putting on his shoes and socks. She said that she did most of the driving because plaintiff had trouble turning (his head); he would have to turn his entire body to look at oncoming traffic. (Tr. 53-54, 57.)

Vocational expert (VE) Dr. Arthur Smith, who was present throughout the hearing, also testified. The ALJ referred the VE to the range-of-motion form in the record.[1] The ALJ's first hypothetical question to the VE asked him to assume an individual with the plaintiff's age, education, training, and "actual work experience," and who could not engage in any frequent forward or side bending at the waist, could not turn his head in any direction more than half the normal degree, could not sit for more than thirty minutes at a time, could not stand for more than ten minutes at a time, could not walk for more than one hour at a time, and was limited to sedentary levels of lifting and carrying. The VE responded that such an individual could perform some oral communication occupations, including telephone solicitor, telemarketer, call-out operator, and machine tenderer. He added that approximately 10,000 such jobs existed in Missouri and about fifty times that number existed nationwide. (Tr. 59-60.)

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[1]Although the ALJ referred the VE to "page 73 in the Exhibits" and "Dr. Krichner's range of motion," it is apparent from the record that the ALJ was referring to the range-of-motion form completed by Dr. Critchlow, as it is the only such form in the record and contains a "73" at the bottom of its first page. (Tr. 156.)

Next, the ALJ asked the VE to assume that the ALJ would find the testimony of the plaintiff and his wife fully credible with regard to plaintiff's limitations. The VE replied that there would be no work available to such an individual, because the limitations of sitting and standing to a maximum of ten minutes "would contra-indicate any type of competitive employment." (Tr. 60.)

B. The ALJ's decision

On June 26, 2001, after reviewing all of the evidence of record and considering the factors suggested by Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984), for evaluating subjective complaints of pain, the ALJ found the following. Plaintiff meets the nondisability requirements for a period of disability and disability insurance benefits under the Act and has not engaged in substantial gainful activity since the alleged onset of disability. He has an impairment or a combination of impairments--residuals from a cervical disc herniation, lumbar degenerative disc disease, and an inguinal hernia--considered "severe" based on the requirements of 20 C.F.R. § 404.1520(b); however, no impairment or combination of them meets or equals in severity the requirements of any impairment listed in the Commissioner's list of disabling impairments, Appendix 1, Subpart P, Regulations No. 4. Plaintiff's allegations regarding his limitations were not fully credible for reasons previously set forth in body of the ALJ's decision (and not determinative of the issues raised by plaintiff in this action). (Tr. 16-17, 19-20.)

Next, the ALJ concluded that plaintiff has the following residual functional capacity (RFC) and limitations: sedentary levels of lifting and carrying, with no walking of more than one hour at one time, no standing of more than ten minutes at one time, no sitting of more than thirty minutes at one time, with no frequent forward or side bending at the waist, and no head turning

in any direction of more than half the normal range. The ALJ also determined that plaintiff cannot perform any of his past relevant work and that plaintiff, a "younger individual" with a high school education, has no transferable skills from any past relevant work. Plaintiff, the ALJ concluded, has the RFC to perform a significant range of sedentary work, but not the full range of such work, giving his nonexertional limitations. Using Medical-Vocational Rule 201.21 as a framework, the ALJ found that plaintiff can perform jobs existing in significant numbers in the national economy--i.e., telephone solicitor, telemarketer, call-out operator, and machine tenderer-- and that he is not disabled. (Tr. 20.)

Plaintiff requested review from the Appeals Council and submitted a letter in which he maintained, inter alia, that the ALJ based part of the decision on the fact that plaintiff could do certain jobs despite the VE's testimony to the contrary. (Tr. 5, 8, 230.) The Appeals Council declined further review. Hence, the ALJ's decision became the final decision of defendant Commissioner subject to judicial review. (Tr. 3.)

II. DISCUSSION

The general issue raised in plaintiff's brief is the whether the ALJ's decision is supported by substantial evidence in the record as whole. The specific issue, however, is narrower, whether the ALJ relied on the VE's response to a flawed hypothetical question. Plaintiff first maintains that the hypothetical question was impermissibly vague for failure to define plaintiff's "actual work experience" in terms of his past relevant work and whether he had acquired any transferable skills. In addition, plaintiff maintains that because the ALJ "made no effort to completely define plaintiff's ability with regard to his functional limitations throughout an eight-hour day," the only way to interpret the ALJ's

RFC determination in a manner consistent with SSR 96-8p and Eighth Circuit precedent would be to assume that the ALJ meant that plaintiff could sit, stand, and walk for a total of eight hours by alternating positions. The problem with making such an assumption, plaintiff asserts, is that it is speculative. (Doc. 10.)

The court's role on review is to determine whether the Commissioner's findings are supported by substantial evidence in the record as a whole. See Krogmeier v. Barnhart, 294 F.3d 1019, 1022 (8th Cir. 2002). "Substantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." Id. In determining whether the evidence is substantial, the court considers evidence that detracts from, as well as supports, the Commissioner's decision. See Prosch v. Apfel, 201 F.3d 1010, 1012 (8th Cir. 2000). So long as substantial evidence supports that decision, the court may not reverse it because substantial evidence exists in the record that would have supported a contrary outcome or because the court would have decided the case differently. See Krogmeier, 294 F.3d at 1022.

A five-step analysis is used for determining disability. See 20 C.F.R. § 404.1520(a)-(f) (2002); Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987) (describing the analysis). "[T]he claimant bears the initial burden to show that he is unable to perform his past relevant work." Frankl v. Shalala, 47 F.3d 935, 937 (8th Cir. 1995). The claimant's burden, if met, shifts to the Commissioner the burden to demonstrate that the claimant retains the physical RFC to perform a significant number of other jobs in the national economy that are consistent with the claimant's impairments and with vocational factors. Id.; see also Singh v. Apfel, 222 F.3d 448, 451 (8th Cir. 2000).

A hypothetical question to a VE must "precisely describe" a claimant's impairments so that the VE may accurately assess whether

jobs exist for the claimant. Newton v. Chater, 92 F.3d 688, 694-95 (8th Cir. 1996); see Pierce v. Apfel, 173 F.3d 704, 707 (8th Cir. 1999) (a proper hypothetical presents to the VE a set of limitations that mirror those of the claimant); Totz v. Sullivan, 961 F.2d 727, 730 (8th Cir. 1992). It "must capture the concrete consequences of claimant's deficiencies." Pickney v. Chater, 96 F.3d 294, 297 (8th Cir. 1996). Testimony from a VE based on an improperly phrased hypothetical does not constitute substantial evidence. Howard v. Massanari, 255 F.3d 577, 582 (8th Cir. 2001).

Turning to plaintiff's arguments, the undersigned finds no fault with the ALJ's hypothetical question to the VE insofar as the question referred to someone with plaintiff's "actual work experience," because the VE was present throughout the entire hearing before the ALJ and heard plaintiff's detailed testimony about his past work in cabinet construction. Moreover, Medical-Vocational Rule 201.21, which the ALJ used as a framework, assumes that the skills from previous work experience are nontransferable.

As to plaintiff's other arguments, however, the undersigned notes that

> [i]n assessing RFC, the adjudicator must discuss the individual's ability to perform sustained work activities in an ordinary work setting on a regular and continuing basis (i.e., 8 hours a day, for 5 days a week, or an equivalent work schedule), and describe the maximum amount of each work-related activity the individual can perform based on the evidence available in the case record.

SSR 96-8p, 1996 WL 374184, at *7 (Social Security Administration July 2, 1996) (footnote omitted); see id. at *1 (defining "regular and continuing basis"). The ALJ did not discuss plaintiff's ability to perform sustained work activities in an ordinary work setting "on a regular and continuing basis." For this reason the decision of the Commissioner should be reversed.

In addition, the Commissioner has recognized "special situations" in which "the medical facts lead to an assessment of RFC which is compatible with the performance of either sedentary or light work except that the person must alternate periods of sitting and standing." SSR 83-12, 1983 WL 31253, at *4 (Social Security Administration 1983). Moreover, "[u]nskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will." Id.

In Misner v. Chater, 79 F.3d 745, 746 (8th Cir. 1996), the ALJ posed a hypothetical question to the VE that assumed in part that the claimant retained the RFC to stand thirty minutes to one hour at a time and sit forty-five minutes to one hour at a time. The ALJ determined that the claimant could perform some light jobs identified by the VE. Id. The claimant argued on appeal that the VE's testimony was inconsistent with SSR 83-12 because not all of the unskilled light jobs listed by the VE would allow him to alternate positions as he must. Id. The court concluded that Misner's argument failed because the VE "acknowledged that a person with Misner's [RFC] would not be capable of performing all jobs categorized as light work but would be capable of performing some light jobs," and "further specifically testified that these jobs allow for alternating positions." Id.

The present action is distinguishable from Misner in that the VE, Dr. Smith, was not directed to assume that the individual would have to alternate between sitting and standing. Consequently, he did not address whether that requirement would affect plaintiff's ability to work as a telephone solicitor, telemarketer, call-out operator, or machine tenderer. See id.; Ramey v. Shalala, 26 F.3d 58, 59 (8th Cir. 1994) (reversing and remanding for an award of benefits where ALJ failed to comply with SSR 83-12).

RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned that the decision of the Commissioner of Social Security be reversed under Sentence 4 of 42 U.S.C. § 405(g) and the action remanded to the Commissioner for rehearing and consideration of the testimony of a vocational expert.

The parties are advised that they have ten (10) days in which to file written objections to this Report and Recommendation. The failure to file timely written objections may waive the right to appeal issues of fact.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this _____ day of August, 2003.